

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARCUS A. MICOLO,

Plaintiffs,

-against-

ORDER ADOPTING REPORT &
RECOMMENDATION
07-CV-4901 (JS) (AKT)

DENNIS P. BRENNAN, SR Court
Reporter,

Defendant.
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APPEARANCES:

For Plaintiff: Marcus A. Micolo, pro se
 #03A3985
 Clinton Correctional Facility
 P. O. Box 2001
 Dannemora, NY 12929

For Defendant: Derrick Jeffrey Robinson, Esq.
 New York State Office of the Attorney General
 200 Old Country Road, Suite 460
 Mineola, NY 11501

SEYBERT, District Judge:

Plaintiff, Marcus A. Micolo ("Micolo" or "Plaintiff") brought this action pursuant to 42 U.S.C. § 1983 against Dennis P. Brennan ("Brennan" or "Defendant") on November 27, 2007. Plaintiff alleges that Defendant failed to accurately transcribe the trial record of Plaintiff's trial, and thereby violated his constitutional rights to due process under the 14th Amendment and "his right to access the court pursuant to plaintiff's 1st and 14th USCA Amendment(s)" (Compl. ¶ 4). Defendant failed to answer. On April 8, 2008, Plaintiff filed his motion for entry of default against Defendant, and on April 24, 2008, the Clerk of the Court issued a Certificate of Default. On April 30, 2008, this Court

referred Plaintiff's motion to Magistrate Judge A. Kathleen Tomlinson. Subsequently, Defendant properly filed his second motion to set aside the Certificate of Default.¹ On March 3, 2009, Judge Tomlinson issued her Report and Recommendation ("R&R"). The R&R was served on Plaintiff on March 4, 2009.

Pursuant to Rule 72 of the Federal Rules of Civil Procedure, any objections to the R&R were to be filed with the Clerk of the Court within ten days of service of the R&R. The time for filing objections has expired and no party has objected. Accordingly, all objections are hereby deemed to have been waived.

Upon review of Judge Tomlinson's R&R, the Court hereby ADOPTS the R&R, except that the Court ORDERS as follows:

(1) Plaintiff's motion for entry of default against Defendant is DENIED; (2) Defendant's motion to set aside the Certificate of Default is GRANTED; (3) Defendant is directed to, within ten days of the date of this Order, file with the Court a letter indicating whether he will accept service of the Complaint as of April 9, 2008; and (4) If Defendant accepts service as of April 9, 2008, he shall file an Answer to the Complaint within twenty (20) days of the docketing of this Order. In the unlikely event that Defendant

¹ Defendant filed his first motion to set aside the certificate of default on May 15, 2008; Judge Tomlinson denied this motion without prejudice on the next day because Defendant failed to comply with the Local Civil Rule 7.1, which requires all motions and all oppositions thereto to be supported by a memorandum of law.

refuses to accept service as of April 9, 2008, the Court may issue a separate Order granting Plaintiff an extension of time to properly re-serve Defendant.

The Clerk of the Court is directed to mail a copy of this Order to Plaintiff.

SO ORDERED.

151 **JOANNA SEYBERT**
Joanna Seybert, U.S.D.J.

Dated: Central Islip, New York
March 18, 2009